No. 80-828

In the Supreme Court of the United States

OCTOBER TERM, 1980

PACIFIC LEGAL FOUNDATION, ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to review a temporary moratorium, announced in a regulation promulgated by the Environmental Protection Agency, on construction of certain major sources of air pollution in highly polluted areas of California, where the Clean Air Act vests exclusive jurisdiction to review regulations and any other final agency action of EPA in the court of appeals.

2. Whether the district court abused its discretion in concluding that petitioners had not demonstrated a probability of success on their claim that provisions of the Clean Air Act which authorize the limitation of federal grant funds to state agencies that do not participate in particular related federal regulatory programs are unconstitutional.

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The opinion of the court of appeals (Pet. App. A-25 to A-32) is reported at 627 F.2d 917. The order of the district court (Pet. App. A-1 to A-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1980. Rehearing was denied by the court of appeals on October 2, 1980 (Pet. App. A-33). The petition for a writ of certiorari was filed on November 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Under Section 109 of the Clean Air Act, 42 U.S.C. (Supp. I) 7409, the Administrator of the Environmental Protection Agency is responsible for establishing two sets of nationwide air quality standards. The "primary" standards, designed to protect the public health, were to be achieved no later than 1975. 42 U.S.C. (1976 ed.) 1857c-5(a)(2)(A); see *Train* v. *NRDC*, 421 U.S. 60, 64-67 (1975). Each state was required to submit to the Administrator for approval a state implementation plan (SIP) for "implementation, maintenance, and enforcement" of the air quality standards for every portion of the state. 42 U.S.C. (Supp. I) 7410(a)(1). If the Administrator found the plan inadequate or if the state declined to submit a plan, the Administrator ultimately was required to promulgate a federal plan for the state. 42 U.S.C. (Supp. I) 7410(c). Each SIP must include emission limitations for stationary pollution sources, schedules for compliance, and provisions for such additional methods of

pollution controls as are necessary. The Act also provides that each SIP must include measures designed to reduce pollution from motor vehicles, including automobile inspection and maintenance ("I/M") and other transportation control programs if necessary to insure attainment and maintenance of the national standards. 42 U.S.C. (Supp. I) 7410(a)(2)(B) and (G).

b. By 1976 it became apparent that many areas of the country had failed to attain the primary ambient air quality standards by the 1975 statutory deadline. A then-existing EPA regulation, 40 C.F.R. 51.18(b) (1976), on its face prohibited construction of any major source of pollution in any area in which the standards for any pollutant generated by the source were not being met. EPA modified this position by publication of an interpretive rule on December 16, 1976, construing that regulation to permit certain major sources of pollution to be put into operation in nonattainment areas in certain situations. 41 Fed. Reg. 55524-55530; 40 C.F.R. Part 51 (1979). Under the interpretive rule, known as the "emission offset" ruling, a new source was permitted if emissions from existing sources were to be reduced by an amount greater than the incremental increase in pollution from the new source, if the new source was held to the lowest achievable rate of emissions, and if the applicant for the permit owned no other source that violated the applicable SIP. EPA also requested the states to develop revised SIP strategies for areas in which the air quality standards were not being met. See 41 Fed. Reg. 28600 (1976).

c. In the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, Congress added a new Part D to Title I of the Act (42 U.S.C. (Supp. I) 7501-7508) applicable to "nonattainment areas" in

which national ambient air quality standards had not been met. Under Part D, the deadlines for attainment of the primary ambient air quality standards for most pollutants were extended until December 31, 1982. To ensure that these new deadlines would be met, Congress required states to submit substantially revised SIP's for nonattainment areas to EPA by January 1, 1979. Clean Air Act Amendments of 1977, Section 129(c), 42 U.S.C. (Supp. I) 7502 note. These revisions were to be approved by EPA by July 1, 1979 if they met the requirements of the Act.

Congress was also concerned that new sources not be constructed in nonattainment areas in a manner that would exacerbate existing violations while the states were formulating their revised plans. Therefore, Congress expressly ratified EPA's emission offset ruling, but directed that it be applied only until July 1, 1979. Section 129(a)(1) of the 1977 Amendments, 42 U.S.C. (Supp. I) 7502 note. For later periods, Congress required each state to include in its SIP, by August 1978,[1] a provision imposing a limited conditional moratorium on construction and modification of major stationary sources after July 1, 1979. The moratorium was to affect only sources that would emit 100 tons or more per year of a pollutant for which the national ambient air quality standard was being violated in a particular area, and it was to operate only until a revised SIP complying with the provisions of Part D was approved or promulgated by EPA. See 42 U.S.C. (Supp. I) 7410(a)(2)(I).

Widespread failure to attain air quality standards by 1975 for automobile exhaust pollutants, such as carbon monoxide and photochemical oxidants (ozone),

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[1] This date is established by Section 406(d)(2) of the 1977 Amendments, 42 U.S.C. (Supp. I) 7401 note.

posed a special problem. In 1977, Congress authorized EPA to grant limited extensions, until December 31, 1987, for meeting these two standards. 42 U.S.C. (Supp. I) 7502(a)(2). But to minimize the adverse health effects, Congress required any state that received an extension to include an enforceable I/M program in its revised SIP and to implement this program "as expeditiously as practicable," but no later than 1982. 42 U.S.C. (Supp. I) 7502(b)(2), 7502 (b)(10) and 7502(b)(11)(B). See H.R. Rep. No. 95-294, 95th Cong., 1st Sess., 282 (1977).

Congress was aware that many states had yet to adopt transportation control measures, including I/M, and that this problem had generated considerable litigation. *See* H.R. Rep. No. 95-294, *supra*, at 286-291.[2] Prompted by suggestions in several of the relevant

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[2] In 1973, acting pursuant to a court order in *NRDC* v. *EPA*, 475 F.2d 968 (D.C. Cir. 1973), the Administrator required states needing transportation control plans to amend their SIP's to include such plans. 38 Fed. Reg. 2194, 10851 (1973). When several states failed or refused to adopt these amendments, the Administrator promulgated federal transportation control plans for those states, including an inspection and maintenance program for motor vehicles, and he ordered the states to adopt implementing legislation. Several states, including California, challenged EPA's authority under the Clean Air Act and the Constitution to require the states, through threat of enforcement actions under 42 U.S.C. (Supp. I) 7413, to adopt transportation control measures. See, *e.g.*, *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975) (*Brown I*); *State of Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975); but see *Commonwealth of Pennsylvania* v. *EPA*, 500 F.2d 246 (3d Cir. 1974). These cases were vacated and remanded by this Court as moot after EPA represented that the federal regulations had to be modified to remove the requirement that the states adopt implementing laws. *EPA* v. *Brown*, 431 U.S. 99

court decisions that withholding of federal funds would be both a useful and constitutionally permissible incentive for state participation,[3] Congress conditioned certain federal grants upon a state's satisfactory participation in the SIP program. Under 42 U.S.C. (Supp. I) 7506(a), where transportation control measures are needed, the revised SIP has not been approved by July 1, 1979, and reasonable efforts to submit such a SIP have not been made, EPA "shall not approve" grants otherwise authorized by the Clean Air Act and the Secretary of Transportation shall not award certain highway grants. In addition, under 42 U.S.C. (Supp. I) 7616(b), grants for sewage treatment works may be withheld or restricted if the state does not have an approved SIP that accounts for the increases in air pollution caused by the sewage works or the residential, commercial, or vehicular growth made possible by the sewage works.

d. Many states that had nonattainment areas did not submit revised SIP's to EPA by July 1, 1979. Some of these states had not adopted special provisions in their existing SIP's imposing the required construction moratorium in these circumstances.[4] There-

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(1977). Thereafter, the court of appeals for the Ninth Circuit again held EPA lacked statutory authority under the Act to bring enforcement actions against the states for failure to implement the federally promulgated SIP requirements involved in that case. *Brown* v. *EPA*, 566 F.2d 665 (9th Cir. 1977) (*Brown II*).

[3] See, *e.g.*, *Brown I*, *supra*, 521 F.2d at 840; *State of Maryland* v. *EPA*, *supra*, 530 F.2d at 228.

[4] On the other hand, more general language having that effect had been adopted by, or promulgated for, the states. 40 C.F.R. 51.18(b) required every SIP to include provisions barring construction of new sources or modification of exist-

fore, acting pursuant to 42 U.S.C. (Supp. I) 7410(c) and 7601, the Administrator promulgated a regulation on July 2, 1979 which had the effect of inserting, or reaffirming the operation of, the required interim moratorium in the SIP of each noncomplying state (Pet. App. A-112 to A-113). This regulation was described as an "interpretive rule," stating the view of the Administrator that the 1977 Amendments, by adding 42 U.S.C. (Supp. I) 7410(a)(2)(I), themselves required imposition of the temporary moratorium and that he lacked any discretion in the matter (Pet. App. A-106 to A-107). No petition for review of this regulation was filed in the court of appeals.

2. California did not submit SIP revisions for *any* of its air pollution control districts by July 1, 1979. A construction moratorium therefore was activated in its SIP by the regulation promulgated on July 2, 1979. In the succeeding months California submitted SIP revisions to EPA covering all regions of the State encompassing nonattainment areas. EPA has proposed action on each of the submitted plans. California requested an extension of the December 31,

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ing sources where such acts would "interfere with attainment or maintenance of a national standard." In reviewing or promulgating state SIP's, EPA inserted the necessary provisions wherever they were lacking. 40 C.F.R. 52.10. California's SIP contained such provisions. See 40 C.F.R. 52.233(d), (f)(2), (f)(3)(ii), (g)(2), and (g)(3). These provisions, effective prior to July 1, 1979, seemingly implemented a construction moratorium. They did not have that effect, however, so long as the EPA's emission offset ruling was in effect. See pages 2-3, *supra*. Once the emission offset ruling was suspended on July 1, 1979, as Congress had directed (see page 3, *supra*), these provisions again became effective as a construction moratorium. EPA promulgated the July 2, 1979, moratorium regulation at issue in this case partially in order to make this effect clear to the public.

1982, deadline for attainment of primary air quality standards for carbon monoxide and ozone for six regions, including major metropolitan nonattainment areas, pursuant to 42 U.S.C. (Supp. I) 7502(a). Revised SIP's for these areas must therefore include an I/M plan among the measures prescribed for control of these pollutants. 42 U.S.C. (Supp. I) 7502(b)(11)(B). EPA has tentatively proposed to disapprove the ozone and carbon monoxide provisions of the revised SIP's submitted for these areas because they do not certify the existence of legal authority necessary to implement an I/M program, as required by 42 U.S.C. (Supp. I) 7502(b)(10).[5] To remedy this deficiency, the California legislature has considered bills to authorize an I/M program and is expected to resume consideration of I/M in the coming year.

Given the current impasse, EPA proposed on September 8, 1980 to invoke the restrictions on certain federal sewer and transportation grant programs, as required by 42 U.S.C. (Supp. I) 7506 (a) and 7616 (b). On December 12, 1980, EPA gave final notice that these restrictions were being imposed. 45 Fed. Reg. 81746.

3. By amended complaint filed on December 21, 1979, petitioners sought to compel the EPA Administrator to perform an allegedly nondiscretionary duty to promulgate a substitute revised SIP for the State of California. In their accompanying motion for a preliminary injunction, however, petitioners sought only to enjoin EPA from applying the limited

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[5] 44 Fed. Reg. 57109 (1979) (San Diego Air Basin); 45 Fed. Reg. 21271 (1980) (South Coast Air Basin); 45 Fed. Reg. 21282 (1980) (San Francisco Air Basin); 45 Fed. Reg. 58882 (1980) (Sacramento metropolitan area); 45 Fed. Reg. 58897 (1980) (Ventura County); and 45 Fed. Reg. 58912 (1980) (Fresno County).

construction moratorium described above to nonattainment areas in California and to enjoin EPA from "threatening" to utilize the funding restriction authority provided by the Act.[6]

The district court declined to issue a preliminary injunction. The district court held that exclusive jurisdiction of the challenge to the construction moratorium was vested by 42 U.S.C. (Supp. I) 7607(b) in the Court of Appeals for the District of Columbia Circuit. In the court's view, whether the moratorium was considered to be the promulgation of a regulation, the promulgation of a state implementation plan, or other final action by EPA, exclusive jurisdiction of this claim lay elsewhere (Pet. App. A-8 to A-16). The district court denied relief on the funding claim because it concluded that petitioners had "virtually no chance of succeeding on the merits" (Pet. App. A-19 to A-20). The court of appeals affirmed in a brief opinion approving the reasoning of the district court (Pet. App. A-25 to A-32).[7]

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[6] In alleging threatened fund termination, petitioners pointed only to a telegram from an EPA official to members of the California legislature (see Pet. App. A-153). The proposed restriction of funding noticed in the Federal Register (see page 7, *supra*) had yet to occur. The federal respondents accordingly suggested that this aspect of the claim was not ripe for adjudication. Given the December 11 notice cited in the text, we no longer press the ripeness claim.

[7] A motion for an injunction pending ruling on a petition for rehearing was denied on September 15, 1980. Petitioners' motion for an injunction pending filing of a petition for a writ of certiorari was denied by the court of appeals on October 16, 1980. Mr. Justice Rehnquist denied a similar application on October 22, 1980.

ARGUMENT

The petition for a writ of certiorari challenges only the denial of a motion for a preliminary injunction. The decision below does not conflict with any decision of this Court or any court of appeals, presents no issue of general importance, and is clearly correct. *Harrison* v. *PPG Industries, Inc.*, No. 78-1918 (May 27, 1980). Review by this Court accordingly is unwarranted.

1. a. The conclusion reached by the court below that EPA's action in instituting the construction moratorium is reviewable only in the court of appeals is clearly correct.[8] The United States Court of Appeals for the District of Columbia Circuit has exclusive original jurisdiction to review, *inter alia*, "any * * * nationally applicable regulations promulgated or final action taken, by the Administrator." The court of appeals for the circuit in which a given state is located has exclusive jurisdiction to review approval or promulgation of "an implementation plan * * * or any other final action of the Administrator * * * which is locally or regionally applicable." 42 U.S.C. (Supp. I) 7607(b)(1), 7607(e). However, even such locally and regionally applicable actions are made reviewable only in the Court of Appeals for the District of Columbia Circuit if the Administrator certifies the nationwide scope or effect of the decision embodied therein. *Ibid.*

In this action petitioners seek review of the July 2, 1979 EPA regulation that had the effect of inserting or clarifying provisions in all state implementa-

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[8] Petitioners' suggestion (Pet. 10) that the district court has inherent "traditional equity jurisdiction" not resting on any statutory grant of jurisdiction, is plainly incorrect. *Victory Carriers* v. *Law*, 404 U.S. 202, 212 (1971).

tion plans, including California's. The regulation expressly states the Administrator's determination of nationwide applicability (Pet. App. A-112), thereby giving clear notice that the proper forum for judicial review is in the District of Columbia Circuit. Petitioners' contention to the contrary rests upon the fact that the July 2, 1979 regulation was classified as an "interpretive rule" by EPA, and was accordingly promulgated without notice and comment under the Administrative Procedure Act, 5 U.S.C. 553(b). But nothing in 42 U.S.C. (Supp. I) 7607(b)(1) excludes interpretive regulations from its provision for exclusive jurisdiction in the court of appeals.

Contrary to petitioners' suggestion (Pet. 10-12), the decision below does not conflict with *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), or *Morton* v. *Ruiz*, 415 U.S. 199 (1974). Neither case addresses the proper forum for judicial review of an interpretive rule. Moreover, the decision below concerning the proper forum for judicial review in no sense "gave substantive effect to an *interpretive rule*" (Pet. 10, 12). Petitioners' claim that EPA impermissibly employed an interpretive rule to establish substantive law could have been raised in a timely petition for review of the July 2, 1979, regulation, but petitioners did not pursue that course. Accordingly, that question is not properly presented here. *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 n.15 (1980).[9]

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[9] Petitioners' assertion is, in any event, incorrect. The moratorium regulation simply announced and implemented the combined effect of Section 129(a) of the 1977 Clean Air Act Amendments and 42 U.S.C. (Supp. I) 7410(a)(2)(I), which cancelled the earlier "emission offset" interpretive rule on July 1, 1979 and mandated the construction moratorium. See pages 2-4, 6-7, *supra*. Nor is there any necessary incon-

c. In any event, the promulgation of the construction limitation on July 2, 1979, was "final action" by the Administrator reviewable only in the court of appeals. 42 U.S.C. (Supp. I) 7607(b)(1). The decision in *Harrison* v. *PPG Industries, Inc.*, *supra*, rejects all arguments that the reach of this jurisdictional provision is narrower than its plain language indicates. Slip op. 8-13. The Court there held, agreeing with the EPA petitioners (*id.* at 10; emphasis added):

> that the phrase, "any other final action" * * * must be construed to mean exactly what it says, namely, *any other* final action.

Petitioners acknowledge (Pet. 10) that "the announcement of the construction ban may have been a 'final action,' " but assert that it escapes the exclusive jurisdiction of the court of appeals under 42 U.S.C. 7607(b)(1) because implementation of the moratorium entails the application of the moratorium regulation to individual permit applications. This contention is unfounded. There is simply no indication, and petitioners do not suggest, that EPA's action is in any way informal or less than definitive.[10]

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sistency between the label "interpretive" and the fact that a regulation affects individuals and businesses. See *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 876, 876 n.153 (D.C. Cir. 1979).

[10] Contrary to petitioners' suggestion (Pet. 9-10), the moratorium regulation does not allow any discretion to the state agency to issue a permit when application is made to construct a new or modified major source of a pollutant for which the projected site does not meet national standards. While conditional permits may be issued for such sources during the moratorium, these permits must prohibit all construction until a revised SIP is approved or promulgated. See 44 Fed. Reg. 37680 (1979).

It is accordingly final for purposes of judicial review. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 151 (1967). It is well established that definitive agency regulations and rulings are final for judicial review purposes, even where implementation has yet to occur and may entail further proceedings. *Id.* at 149-151; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 193-200 (1956); *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *Columbia System* v. *United States*, 316 U.S. 407, 418-419 (1942).[11] In any event, if petitioners were correct in suggesting that the construction moratorium does not represent final agency action reviewable in the court of appeals under 42 U.S.C. (Supp. I) 7607(b)(1), the district court was equally lacking in jurisdiction, for reviewable final agency action under the Administrative Procedure Act would then be lacking. *Harrison* v. *PPG Industries, Inc.*, *supra*, slip op. 8, 10. Accordingly, on any view of the law, the district court was without jurisdiction of petitioners' challenge to the construction limitation.

2. Petitioners attempt to buttress their jurisdictional argument by asserting (Pet. 11-12) that EPA has altered its position as to the nature and effect of the July 2, 1979 regulation. This effort is unavailing. The notice of promulgation of the moratorium explicitly stated the Administrator's position that the 1977 Clean Air Act Amendments made imposition of the construction limitation "automatic and mandatory" (Pet. App. A-106); that the moratorium regu-

[11] The ruling deemed final in *Harrison*, that PPG Industries' proposed facility was subject to a particular set of new source performance standards, left open the question whether the facility met those standards. Petitioners' argument therefore challenges the result in *Harrison*.

lation activated the construction restrictions already present in most states' SIP's (*ibid.*); that moratorium provisions were added to any SIP's deficient or ambiguous in this regard (*id.* at A-107); and that, for purposes of judicial review, the moratorium "rule" was "nationally applicable and is based on determinations of nationwide scope and effect" (*id.* at A-112). EPA's consistent position therefore supports the jurisdictional ruling below.

3.a. In view of the jurisdictional defect infecting petitioners' claim, there is no need to consider the constitutional issues they would raise (Pet. 5-8). These claims are, in any event, entirely unfounded. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), is inapposite here, for the construction moratorium does not entail regulation of any state functions at all, much less "functions essential to separate and independent existence" of the state. Compare, *National League of Cities*, *supra*, 426 U.S. at 845, 852. What is challenged here is simply direct regulation of private commerce authorized by the Commerce Clause. See *National League of Cities*, 426 U.S. at 845. Such "direct federal regulation by definition involves no intrusion on state sovereignty whatsoever." *District of Columbia* v. *Train*, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977); *Brown* v. *EPA*, 521 F.2d 827, 840 (9th Cir. 1975), vacated and remanded, 431 U.S. 99 (1977), opinion on remand, 566 F.2d 665 (9th Cir. 1977) (see note 2, *supra*).[12] The courts of appeals have uniformly sus-

[12] The *Brown* decisions of the court of appeals do not support petitioners' contentions. In the *Brown* cases, EPA claimed the authority to direct the state to take particular action and adopt particular state laws, and to enforce this

tained federal laws, passed under the Commerce Clause power, which, like the Clean Air Act, allow the states the choice as to whether to participate in a federal regulatory scheme. See, *e.g.*, *Friends of the Earth* v. *Carey*, 552 F.2d 25, 36-39 (2d Cir.), cert. denied, 434 U.S. 902 (1977); *Sierra Club* v. *EPA*, 540 F.2d 1114, 1140 (D.C. Cir. 1976), cert. denied, 430 U.S. 959 (1977). See also, *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 84 n.27 (1978). Petitioners' Tenth Amendment claim is therefore devoid of merit.[13]

b. Petitioners' arguments concerning funding limitations may be raised in a petition for review of whatever limitations the Administrator ultimately applies to California's non-attainment areas and therefore should not be considered here. In any case, the district court plainly did not abuse its discretion in denying a preliminary injunction based on a determination that petitioners have "virtually no chance of succeeding on the merits" of their constitutional claim. This Court repeatedly has upheld the constitutionality of statutes conditioning availability of federal grant funds upon state participation in related regulatory programs. *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143-144 (1947); *Steward*

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authority in the courts through injunctive relief, imposition of a receivership on state functions, and contempt citations against state officials, including the governor. Here, EPA has done none of these things, and asserts no power to require the State to act at all. EPA has not, in fact, *required* California to do anything.

[13] Petitioners' reliance (Pet. 7) on the Guaranty Clause is equally unfounded. See *Baker* v. *Carr*, 369 U.S. 186, 224 (1962).

Machine Co. v. *Davis*, 301 U.S. 548, 589-591 (1937); see also *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 22 (plurality opinion).

c. Petitioners' repeated claims (Pet. 6-7, 13) that the Administrator has breached a mandatory duty to promulgate a substitute SIP for California on July 1, 1979, is not properly presented to this Court. Petitioners deliberately excluded this contention from the scope of their motion for a preliminary injunction (Pet. App. A-7), and this question was not addressed by either court below. Petitioners' motion for summary judgment on this point has been presented to the district court and is now awaiting decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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